

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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NUTRISHARE, INC., a California  
Corporation,

Plaintiff,

v.

BIORX, L.L.C., an Ohio Limited  
Liability Company,

Defendant.

NO. CIV. S-08-1252 WBS EFB

MEMORANDUM AND ORDER RE:  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION;  
MOTION TO DISMISS FOR IMPROPER  
VENUE OR, ALTERNATIVELY,  
MOTION TO TRANSFER VENUE

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Plaintiff Nutrishare, Inc. brought this action alleging  
trademark infringement and unfair competition stemming from  
defendant BioRx, L.L.C.'s use of its "NutriThrive" mark.  
Defendant now moves to dismiss plaintiff's Complaint for a lack  
of personal jurisdiction and improper venue or, alternatively,  
transfer the action to another venue.

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1 I. Factual and Procedural Background

2 Plaintiff, a corporation duly organized and existing  
3 under the laws of the State of California with its principal  
4 place of business in Elk Grove, California, specializes in the  
5 nationwide business of providing products and services related to  
6 "total parenteral nutrition" (TPN)<sup>1</sup> directly to consumers in  
7 their homes. (Compl. ¶ 1.) Proceeding under its "Nutrishare"  
8 designation since 1991, plaintiff formally registered the  
9 "Nutrishare" mark in the category of retail pharmacy and mail  
10 order services on September 3, 2002. (Id. at ¶ 10.) Throughout  
11 plaintiff's commercial existence, the mark has been prominently  
12 displayed on its products, letter head, invoices, advertising,  
13 and publications--either in standard characters or in conjunction  
14 with a logo depicting "Nutrishare" in block letters preceded by  
15 the stylized image of a bag and IV catheter. (Id. at ¶ 12.)

16 Defendant, a limited liability company organized and  
17 existing under the laws of the State of Ohio with its principal  
18 place of business in Cincinnati, Ohio, is a national provider and  
19 distributor of specialty pharmaceuticals, medical supplies, and  
20 clinical support services. (Id. at ¶ 2; Rielly Decl. ¶ 3.) On  
21 November 18, 2007, defendant formally launched its own  
22 TPN-related products and services division, designated  
23 "NutriThrive." (Compl. ¶ 13.)

24 Based on defendant's use of the "NutriThrive" mark,  
25 plaintiff filed its Complaint on June 4, 2008 in the Eastern

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27 <sup>1</sup> TPN is the practice of supplying nutrients  
28 intravenously to individuals who suffer from ailments that  
deteriorate their gastrointestinal system to such a degree that  
they can no longer eat and digest foods. (Compl. ¶ 1.)

1 District of California, alleging the following claims: (1)  
2 Trademark Infringement--Lanham Act § 31(1), 15 U.S.C. § 1114(1);  
3 (2) Common Law Trademark Infringement; (3) Unfair  
4 Competition--Lanham Act § 43(a), 15 U.S.C. § 1125(a); and (4)  
5 Unfair Competition--California Business and Professions Code §§  
6 17200-17210. On July 16, 2008, defendant filed a motion to  
7 dismiss the Complaint pursuant to Federal Rule of Civil Procedure  
8 12(b)(2) for a lack of personal jurisdiction. Should the court  
9 determine personal jurisdiction in California to be proper,  
10 defendant moves to dismiss the Complaint for improper venue  
11 pursuant to Rule 12(b)(3) or, alternatively, transfer venue to  
12 the Southern District of California.

13 II. Discussion

14 A. Motion to Dismiss for Lack of Personal Jurisdiction

15 A plaintiff has the burden of establishing that the  
16 court has personal jurisdiction over a defendant. Doe v Unocal  
17 Corp., 248 F.3d 915, 922 (9th Cir. 2001). In assessing a  
18 plaintiff's showing, the court may consider evidence presented in  
19 affidavits as well as other evidence procured during discovery.  
20 But when the court acts on the motion without holding a plenary  
21 evidentiary hearing, as here, a plaintiff need only make a prima  
22 facie showing of jurisdictional facts to withstand the motion to  
23 dismiss. Id.; see also Rano v. Sipa Press, Inc., 987 F.2d 580,  
24 587 n.3 (9th Cir. 1993) (noting that where the district court  
25 "relies solely on affidavits and discovery materials, the  
26 plaintiff need only establish a prima facie case of  
27 jurisdiction"). When not directly controverted, a plaintiff's  
28 version of the facts must be taken as true and conflicts between

1 the facts contained in the parties' affidavits should be resolved  
2 in favor of this plaintiff. Doe, 248 F.3d at 922. Once a  
3 defendant has contradicted allegations contained in the  
4 complaint, however, a plaintiff may not rest on the pleadings,  
5 but must present admissible evidence which, if true, would  
6 support the exercise of personal jurisdiction. Harris Rutsky &  
7 Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122,  
8 1129 (9th Cir. 2003).

9 In union with a plaintiff's burden, a federal court may  
10 only exercise personal jurisdiction over a defendant when such  
11 jurisdiction comports with the law of the state in which the  
12 court sits and with the requirements of due process. Lee v City  
13 of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001). "California  
14 [law] permits the exercise of personal jurisdiction to the full  
15 extent permitted by due process." Bancroft & Masters, Inc. v.  
16 Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000); see  
17 also Cal Civ. Proc. Code § 410.10 ("A court of this state may  
18 exercise jurisdiction on any basis not inconsistent with the  
19 Constitution of this state or of the United States.").

20 Due process requires a defendant to have certain  
21 minimum contacts with the forum state so that permitting the suit  
22 would not offend "traditional notions of fair play and  
23 substantial justice." Int'l Shoe Co v. Washington, 326 U.S. 310,  
24 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940));  
25 see also World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297  
26 (1980) (holding that the defendant's "conduct and connection with  
27 the forum state" must be such that the defendant "should  
28 reasonably anticipate being haled into court there"). The nature

1 and quality of the contacts with the forum state necessary to  
2 support personal jurisdiction depend upon whether the defendant  
3 consents to jurisdiction or, alternatively, whether the plaintiff  
4 asserts general or specific personal jurisdiction over the  
5 defendant. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316,  
6 1320 (9th Cir. 1998).

7 1. Consent to Personal Jurisdiction

8 Recognizing that "there are a 'variety of legal  
9 arrangements' by which a litigant may give 'express or implied  
10 consent' to the personal jurisdiction" of a state, Burger King  
11 Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (citation  
12 omitted), plaintiff argues that defendant consented to  
13 jurisdiction in California as a matter of law when it registered  
14 as a non-resident pharmacy with the California State Board of  
15 Pharmacy and appointed an agent for service of process. The  
16 Ninth Circuit has not definitively stated whether a foreign  
17 company's registration to do business in a state and appointment  
18 of an agent for service of process are acts that equal consent to  
19 personal jurisdiction in that state. Other courts have decided  
20 the issue both ways. Compare Ratliff v. Cooper Labs., Inc., 444  
21 F.2d 745, 748 (4th Cir. 1971) (holding that "the application to  
22 do business and the appointment of an agent for service . . . is  
23 of no special weight in the [jurisdictional] context") with  
24 Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir.  
25 1990) ("The whole purpose of requiring designation of an agent  
26 for service is to make a nonresident suable in the local  
27 courts.").

28 This jurisdictional conflict, however, is not entirely

1 applicable to the instant action. Each case that plaintiff  
2 relies upon to establish jurisdictional consent--and even the  
3 cases that directly controvert its argument--deal with a foreign  
4 corporation that had registered to do business within a  
5 particular state and had appointed an agent for service in that  
6 specific context. Notably, defendant has never registered with  
7 the California Secretary of State, as it would be required to do  
8 if it were "doing business in" California as contemplated by  
9 those cases. See Cal. Corp. Code § 17451(a) ("Before transacting  
10 intrastate business in this state, a foreign limited liability  
11 company shall register with the Secretary of State."). Rather,  
12 defendant has only registered with the California State Board of  
13 Pharmacy as it must to do in the event that it, like other  
14 nonresident pharmacies subject to California's Pharmacy Law, Cal.  
15 Bus. & Prof. Code §§ 4000-4480, chose to ship any controlled  
16 substances to consumers in California from outside the state. In  
17 doing so, defendant was also required to designate a agent for  
18 service of process by section 4112 of the California Business and  
19 Professions Code. Cal. Bus. & Prof. Code § 4111(c)(1).<sup>2</sup>

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21 <sup>2</sup> Additionally, in section 4120(d) of the California  
22 Business and Professions Code, the statute declares that "[t]he  
23 Legislature, by enacting this section, does not intend a license  
24 issued to any nonresident pharmacy pursuant to this section to  
25 serve as any evidence that the nonresident pharmacy is doing  
26 business within this state." Cal. Bus. & Prof. Code § 4120(d)  
27 (emphasis added). While it appears that the primary legislative  
28 intent of this subsection was to distinguish between nonresident  
pharmacies who conduct intrastate business from those who conduct  
interstate business for licensure and taxation purposes,  
Governor's Chaptered Bill File for Assembly Bill No. 2025 (1968  
Reg. Sess.), Chapter 1463, it is nonetheless serves to further  
separate defendant from plaintiff's proffered cases dealing  
exclusively with defendants that were found to have explicitly  
"registered to do business within" a particular state.

Moreover, plaintiff's argument that voluntary compliance with any such state statute requiring registration and appointment of an agent for service therein amounts to substantial contact for jurisdictional purposes does not comport with due process. By registering with an agency of the state, a foreign company "only potentially subjects itself to jurisdiction; it does not subject itself to potential jurisdiction." Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 888 (S.D. Tex. 1993); see also id. at 888-89 ("The designation of an agent simply gives the company more efficient notice than [other methods of] service. . . . In complying with the [forum state's] registration statute, [defendant] consented to personal jurisdiction in [the forum state] only if the jurisdiction were constitutional.") (emphasis added). "Registration to do business and appointment of an agent for service of process, especially when done to fulfill state law requirements, . . . do not constitute a general business presence or consent to suit in [the forum state's] courts on every matter." Id. at 889; see also Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) ("Not only does the mere act of registering an agent not create [defendant's] general business presence in [the forum state], it also does not act as consent to be hauled into [the forum state's] courts on any dispute with any party anywhere concerning any matter.").

Consequently, because due process is the cornerstone of personal jurisdiction, this court is not permitted to haul a nonresident company like defendant across state lines on the fiction that it somehow consented to jurisdiction in California.

1 See Leonard, 829 F. Supp. at 889 ("The idea that a foreign  
2 corporation consents to jurisdiction in [the forum state] by  
3 completing a state-required form, without having Contact with  
4 [forum state], is entirely fictional. Due process is central to  
5 consent; it is not waived lightly. A waiver through consent must  
6 be willful, thoughtful, and fair. 'Extorted actual consent' and  
7 'equally unwilling implied consent' are not the stuff of due  
8 process.") (citation omitted); see also Ratliff v. Cooper Labs.,  
9 Inc., 444 F.2d 745, 748 (4th Cir. S.C. 1971) ("The principles of  
10 due process require a firmer foundation than mere compliance with  
11 state domestication statutes.").

## 12 2. General Jurisdiction

13 Under general jurisdiction, a defendant whose contacts  
14 with a state are "substantial" or "continuous and systematic" can  
15 be brought into court in that state in any action, even if the  
16 action is unrelated to those contacts. See Helicopteros  
17 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984).  
18 "This is an exacting standard, as it should be, because a finding  
19 of general jurisdiction permits a defendant to be haled into  
20 court in the forum state to answer for any of its activities  
21 anywhere in the world." Schwarzenegger v. Fred Martin Motor Co.,  
22 374 F.3d 797, 801 (9th Cir. 2004); see also Bancroft & Masters,  
23 Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)  
24 ("The standard for establishing general jurisdiction is 'fairly  
25 high,' and requires that the defendant's contacts be of the sort  
26 that approximate physical presence.") (internal citations  
27 omitted).

28 Here, the court cannot exercise general jurisdiction



1 over defendant because its contacts do not qualify as either  
2 substantial or continuous and systematic. It is uncontested that  
3 defendant's principal place of business is in Ohio, owns no  
4 property in California, owes no taxes in California, and  
5 maintains no employees or bank accounts in California. (Hill  
6 Decl. ¶¶ 9, 10; Pfister Decl. ¶ 13; Def.'s Reply Mem. in Supp. of  
7 Mot. to Dismiss 2:8-10.) Although it has the burden of  
8 establishing general jurisdiction, plaintiff has asserted little  
9 to this effect, save conclusory assertions that defendant  
10 maintains relationships with business partners and nursing  
11 agencies in the state. Defendant categorically denies these  
12 assertions, and has presented substantial evidence to the  
13 contrary. (Hill Decl. ¶ 5; Pfister Decl. ¶ 13); see also  
14 Schwarzenegger, 374 F.3d at 800 (finding that "plaintiff cannot  
15 'simply rest on the bare allegations of its complaint'" because  
16 only "uncontroverted allegations in the complaint must be taken  
17 as true.") (citations omitted).

18           Given the paucity of plaintiff's contentions concerning  
19 substantial activity between defendant and California, it is  
20 apparent that defendant's activities in the forum state "were  
21 more occasional than continuous, and more infrequent than  
22 systematic." Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1331  
23 (9th Cir. 1984). Even assuming that plaintiff could provide  
24 evidence that defendant maintained such scarce contacts, it is  
25 evident that plaintiff's allegations would still fall well short  
26 of demonstrating the "'continuous and systematic' contacts that  
27 the Supreme Court and [the Ninth Circuit] have held to constitute  
28 sufficient presence' to warrant general jurisdiction."

1 Schwarzenegger, 374 F.3d at 801; see, e.g., Helicopteros  
2 Nacionales de Colombia, S.A., 466 U.S. at 416 (no jurisdiction  
3 over foreign corporation that sent officer to forum for one  
4 negotiating session, accepted checks drawn on a forum bank,  
5 purchased equipment from the forum, and sent personnel to the  
6 forum to be trained); Cubbage v. Merchant, 744 F.2d 665, 667-68  
7 (9th Cir. 1984) (no jurisdiction over doctors despite significant  
8 numbers of patients in forum, use of forum's state medical  
9 insurance system and telephone directory listing that reached  
10 forum); Gates Learjet Corp., 743 F.2d at 1330-31 (no jurisdiction  
11 over defendants despite several visits and purchases in forum,  
12 solicitation of contract in forum that included choice of law  
13 provision favoring forum, and extensive communication with  
14 forum); Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240,  
15 1243 (9th Cir. 1984) (developing sales force in forum state  
16 insufficient); Cornelison v. Chaney, 16 Cal. 3d 143, 149 (1976)  
17 (holding that--despite the defendant's activity in California  
18 consisting of some twenty trips a year into the state over the  
19 past seven years to deliver and obtain goods, an independent  
20 contractor relationship with a local broker, and a Public  
21 Utilities Commission license--"these contacts are not sufficient  
22 to justify the exercise of jurisdiction over defendant without  
23 regard to whether plaintiff's cause of action is relevant to  
24 California activity").

### 25 3. Specific Jurisdiction

26 Having concluded both that defendant did not consent to  
27 personal jurisdiction and that the court does not have general  
28 jurisdiction over defendant, the court next examines plaintiff's

1 allegations through the analytical lens of specific jurisdiction.  
2 The following three-part test dictates whether specific  
3 jurisdiction can be exercised over defendant:

4 (1) The non-resident defendant must purposefully direct  
5 his activities or consummate some transaction with the  
6 forum or resident thereof; or perform some act by which  
7 he purposefully avails himself of the privilege of  
8 conducting activities in the forum, thereby invoking the  
9 benefits and protections of its laws;

10 (2) the claim must be one which arises out of or relates  
11 to the defendant's forum-related activities; and

12 (3) the exercise of jurisdiction must comport with fair  
13 play and substantial justice, i.e. it must be reasonable.

14 Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987) (emphasis  
15 added). The plaintiff bears the burden of satisfying the first  
16 two prongs of the test. Sher v. Johnson, 911 F.2d 1357, 1361  
17 (9th Cir. 1990). If the plaintiff succeeds in satisfying both of  
18 the first two prongs, the burden then shifts to the defendant to  
19 "present a compelling case" that the exercise of jurisdiction  
20 would not be reasonable. Burger King Corp. v. Rudzewicz, 471  
21 U.S. 462, 476-78 (1985).

22 a. Purposefully Avail/Direct

23 This prong of the specific jurisdiction test has been  
24 further subdivided into two distinct questions: whether BioRx  
25 either (1) "purposefully availed" itself of the privilege of  
26 conducting activities in the forum, or (2) "purposefully  
27 directed" its activities toward the forum. See Schwarzenegger v.  
28 Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) ("We  
often use the phrase 'purposeful availment,' in shorthand  
fashion, to include both purposeful availment and purposeful  
direction, but availment and direction are, in fact, two distinct  
concepts. A purposeful availment analysis is most often used in

1 suits sounding in contract. A purposeful direction analysis, on  
2 the other hand, is most often used in suits sounding in tort.")  
3 (internal citations omitted).

4 i. Purposeful Availment Generally

5 A showing that a defendant purposefully availed itself  
6 of the privilege of doing business in a forum state typically  
7 consists of evidence of the defendant's contacts or actions in  
8 the forum. By making such contacts or taking such actions, a  
9 defendant "purposefully avails itself of the privilege of  
10 conducting activities within the forum State, thus invoking the  
11 benefits and protections of its laws." Hanson v. Denckla, 357  
12 U.S. 235, 253 (1958). In return for these "benefits and  
13 protections," a defendant must "submit to the burdens of  
14 litigation in that forum." Burger King, 471 U.S. at 476; see  
15 also Cote v. Wadel, 796 F.2d 981, 984 (7th Cir. 1986)  
16 ("[P]ersonal jurisdiction over nonresidents of a state is a quid  
17 for a quo that consists of the state's extending protection or  
18 other services to the nonresident.").

19 With respect to this inquiry, plaintiff merely  
20 reiterates the above-addressed argument that defendant  
21 purposefully availed itself of the benefits and privileges of  
22 California when it registered with the California State Board of  
23 Pharmacy and therein appointed an agent for service of process.  
24 Because the court has acknowledged that due process does not  
25 permit it to haul defendant across state lines simply based upon  
26 its compliance with a state statute, the traditional  
27 justification for finding purposeful availment thus does not  
28 apply. See supra, Section II.A. To the extent that defendant's

1 conduct might justify the exercise of personal jurisdiction in  
2 California, therefore, such conduct must have been purposefully  
3 directed at California.

4 ii. Purposeful Direction

5 In contrast to purposeful availment, a showing that a  
6 defendant purposefully directed his conduct toward a forum state  
7 usually consists of evidence of the defendant's actions outside  
8 the forum state that are directed at the forum, such as the  
9 distribution in the forum state of goods originating elsewhere.  
10 Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75 (1984);  
11 see also World-Wide Volkswagen, 444 U.S. at 297-98 (noting that a  
12 "forum State does not exceed its powers under the Due Process  
13 Clause if it asserts personal jurisdiction over a corporation  
14 that delivers its products into the stream of commerce with the  
15 expectation that they will be purchased by consumers in the forum  
16 State"); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899  
17 (9th Cir. 2002) (finding purposeful direction where the defendant  
18 distributed its pop music albums from Europe in the forum state).  
19 Significantly, due process permits the exercise of personal  
20 jurisdiction over a defendant who "purposefully directs" his  
21 activities at residents of a forum, even in the "absence of  
22 physical contacts" with the forum. Burger King, 471 U.S. at 476  
23 (citation omitted).

24 Purposeful direction is evaluated under the three-part  
25 "effects" test traceable to the United States Supreme Court's  
26 decision in Calder v. Jones, 465 U.S. 783 (1984). Schwarzenegger  
27 v. Fred Martin Motor Co., 374 F.3d 797, 803 (9th Cir. Cal. 2004).  
28 Under Calder, "the 'effects' test requires that the defendant

1 allegedly have (1) committed an intentional act, (2) expressly  
2 aimed at the forum state, (3) causing harm that the defendant  
3 knows is likely to be suffered in the forum state." Dole Food  
4 Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002). However,  
5 courts in this circuit are warned not to focus too narrowly on  
6 the test's third prong--the effects prong--holding that  
7 "something more" is needed in addition to a mere foreseeable  
8 effect. Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir.  
9 2006). In other words, courts must recognize that the "effects"  
10 test cannot stand for the broad proposition that a foreign act  
11 with foreseeable effects in the forum state will always give rise  
12 to specific jurisdiction, but rather must demonstrate "something  
13 more"--i.e., "what the Supreme Court described as 'express  
14 aiming' at the forum state." Id. (citation omitted). Thus, the  
15 pertinent inquiry here is whether defendant's conduct was  
16 expressly aimed at California.

17 Obligated only to present a prima facie case, see Data  
18 Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th  
19 Cir. Cal. 1977) ("Any greater burden . . . would permit a  
20 defendant to obtain a dismissal simply by controverting the facts  
21 established by a plaintiff."), plaintiff sufficiently alleges  
22 that defendant acted intentionally in selecting the "NutriThrive"  
23 mark to promote its TPN-related product line with full knowledge  
24 of plaintiff and its "Nutrishare" mark. See Dole Foods Co., 303  
25 F.3d at 1111 ("Because [the plaintiff] has sufficiently alleged  
26 that [the defendants] acted intentionally, we skip to the  
27 'express aiming' requirement.").

28 Plaintiff contends that at least three grounds exist

1 whereby defendant's conduct satisfies the "expressly aimed"  
2 requirement, which is met when the defendant is alleged to have  
3 engaged in conduct targeted at a plaintiff whom the defendant  
4 knows to be a resident of the forum state. Id. Specifically,  
5 plaintiff asserts that defendant maintains an interactive website  
6 that reaches out to California residents, actively solicits new  
7 California customers, and has ongoing commercial relationships  
8 with California customers.

9           Whether defendant's maintenance of its website  
10 constitutes purposeful direction necessitates application of the  
11 "sliding scale" approach approved by the Ninth Circuit in  
12 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997).  
13 See id. at 419 (adopting the test originated by the district  
14 court in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119  
15 (W.D. Pa. 1997)). Under the sliding scale approach, "the  
16 likelihood [that] personal jurisdiction can be constitutionally  
17 exercised is directly proportionate to the nature and quality of  
18 commercial activity that an entity conducts over the Internet."  
19 Zippo Mfg. Co., 952 F. Supp. at 1124.

20           At one end of this sliding scale, the defendant  
21 conducts online business transactions over the Internet with  
22 residents of the forum. Id. "In such situations, jurisdiction  
23 is almost always proper" because the defendant has asserted  
24 itself "into the forum and made actual contact, often commercial,  
25 with a forum resident." Callaway Golf Corp. v. Royal Canadian  
26 Golf Ass'n, 125 F. Supp. 2d 1194, 1202 (C.D. Cal. 2000) (citation  
27 omitted). At the other end of the scale are "passive" websites,  
28 through which the defendant simply posts information to those who

1 access the site, such as advertisements and informational pieces  
2 about the website's host. Id.; see id. ("A passive Web site that  
3 does little more than make information available to those who are  
4 interested in it is not grounds for the exercise of personal  
5 jurisdiction.") (citation omitted). In the middle of the sliding  
6 scale are "interactive" websites that, for example, allow the  
7 user to exchange information with the defendant host site. Zippo  
8 Mfg. Co., 952 F. Supp. at 1124. With respect to "interactive"  
9 websites, courts must examine "the level of interactivity and  
10 commercial nature of the exchange of information that occurs on  
11 the Web site" to determine if the defendant has purposefully  
12 availed itself of the forum to make the exercise of jurisdiction  
13 comport with traditional notions of fair play and substantial  
14 justice. Cybersell, 130 F.3d at 420 (citing Zippo Mfg. Co., 952  
15 F. Supp. at 1124).

16 Here, defendant's website falls somewhere in the  
17 middle, with certain features implicating both the passive and  
18 business transaction ends of the sliding scale continuum.  
19 Specifically, the website serves predominantly as a large-scale,  
20 static advertisement for defendant's products and/or services,  
21 and defendant does not conduct instant online transactions by  
22 allowing prospective browsers to purchase "NutriThrive" supplies  
23 and/or services directly over the Internet. The website does,  
24 however, present prospective browsers with a series of  
25 interactive functions that elevate it beyond the scope of an  
26 archetype "passive" website, including a "discussion board" in  
27 which any user can post messages or chat on-line with one of one  
28 of defendant's "consumer advocates"-- i.e., employees who are



1 also consumers of "NutriThrive" products and/or services (Okamoto  
2 Decl., Ex. B.); a "Referral" section where any browser can sign  
3 up to become a "NutriThrive consumer" or refer a patient to  
4 become a "NutriThrive consumer" (Id.); and a "Contact Us" email  
5 interface page that gives prospective browsers the ability to  
6 request further information online regarding defendant's supplies  
7 and/or services. (Id. at Ex. A.) Thus, while defendant's  
8 website does not possess many of the characteristics of websites  
9 that are undeniably sufficient to demonstrate purposeful  
10 direction at the forum state, it nonetheless could qualify as an  
11 interactive website because "even a cursory glance at the  
12 [website] clearly illustrates that the site mainly serves to  
13 advertise and promote sales of the [defendant's] service."  
14 WebZero, LLC v. ClicVU, Inc., No. 08-0504, 2008 WL 1734702, at \*6  
15 (C.D. Cal. Apr. 4, 2008); see also id. ("Despite the absence of  
16 [explicit means of business transactions], the Court finds that  
17 the site is fundamentally a commercial website because it  
18 purports to offer and provide services to visitors."); cf.  
19 Rubbercraft Corp. of Cal. v. Rubbercraft, Inc., No. 97-4070, 1997  
20 WL 835442, at \*3 (C.D. Cal. Dec. 17, 1997) (finding purposeful  
21 availment/direction based partially on the fact that defendant's  
22 used national advertising, maintained an 800 number, and operated  
23 a web-page that advertised defendant's product and gathered  
24 customer information).

25           Although the website demonstrates a significant level  
26 of interactivity, defendant's stand-alone maintenance of it does  
27 not conclusively constitute purposeful direction. See Cybersell,  
28 130 F.3d at 419-20 (declining to exercise personal jurisdiction

1 over a defendant whose website allowed users to list their  
 2 addresses with the site, indicate an interest in the defendant's  
 3 services, and view advertisements and other information posted on  
 4 the site). However, plaintiff has sufficiently alleged  
 5 additional conduct directly targeting California--thus satisfying  
 6 the requirement of "something more." See Rio Props. v. Rio Int'l  
 7 Interlink, 284 F.3d 1007, 1020 (9th Cir. 2002) ("While  
 8 [defendant's] assertion [that it operates only a passive website]  
 9 may be true, operating even a passive website in conjunction with  
 10 'something more'--conduct directly targeting the forum--is  
 11 sufficient to confer personal jurisdiction."). Specifically,  
 12 defendant's website explicitly targets California consumers with  
 13 an announcement in the "NEWS AND EVENTS" section--prominently  
 14 displayed as the centerpiece of defendant's "NutriThrive"  
 15 homepage--that it will be attending the 2008 Oley Conference held  
 16 in San Diego, California between June 26 and June 29, 2008.<sup>3</sup>  
 17 (Okamoto Decl. Ex. B.) Because the majority of the Oley  
 18 Conference attendees are local home infusion customers that

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20 <sup>3</sup> Plaintiff also argues that defendant's subsequent  
 21 participation in the June 26-29 Oley Conference constitutes  
 22 further evidence of purposeful availment/direction for purposes  
 23 of the jurisdictional analysis. (Okamoto Decl. ¶ 7-12.) Because  
 24 the Oley Conference took place after plaintiff filed its  
 25 Complaint on June 4, 2008, however, the court cannot consider  
 26 allegations stemming directly from defendant's actual  
 27 participation in the event. See Farmers Ins. Exch. v. Portage La  
 28 Prairie Mut. Ins. Co., 907 F.2d 911, 913 (9th Cir. 1990) ("Only  
 contacts occurring prior to the event causing the litigation may  
 be considered."); see also Klinghoffer v. S.N.C. Achille Lauro Ed  
Altri-Gestione, 937 F.2d 44, 52 (2d Cir. 1991) (refusing to  
 recognize post-filing allegations for jurisdictional purposes  
 "because personal jurisdiction depends on the defendant's  
 contacts with the forum state at the time the lawsuit was  
 filed."); accord McFarlane v. Esquire Magazine, 74 F.3d 1296,  
 1301 (D.C. Cir. 1996).

1 benefit from TPN-related products and services, this  
2 California-based conference serves as a crucial marketing  
3 exhibition for national home infusion companies such as the  
4 parties to this lawsuit. (Okamoto Decl. ¶ 7.) Thus, it is fair  
5 to say that "[t]he website's content suggests that [defendant]  
6 was looking to attract [customers] in California" insofar as it  
7 "targeted specific markets including California." In-N-Out  
8 Burgers v. Basso, No. 05-1231, 2005 WL 5337562, at \*2 (C.D. Cal.  
9 June 27, 2005); see id. ("[B]ecause the defendant deliberately  
10 directed its advertising and solicitation efforts toward  
11 California residents, the purposeful availment prong is  
12 satisfied."); Ind. Plumbing Supply, Inc. v. Standard of Lynn,  
13 Inc., 880 F. Supp. 743, 747 n.2 (C.D. Cal. 1995) (finding that,  
14 given the California-based features apparent in its national  
15 advertisement, "the defendant could reasonably anticipate that it  
16 would receive some interest from California customers").

17 Defendant's alleged conduct constituting "something  
18 more" is also evinced by its concession that it maintains  
19 commercial relationships with two Southern California-based  
20 "NutriThrive" customers.<sup>4</sup> See id. at 747 (holding that the  
21

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22 <sup>4</sup> Defendant contends that both of its California-based  
23 customers use "NutriThrive" products for enteral purposes only--a  
24 method of nutrient delivery where fluid is given directly into  
25 the gastrointestinal tract--and thus do not compete with  
26 plaintiff's TPN-related services. This argument fails on two  
27 grounds. First, plaintiff asserts that it also provides  
28 competing enteral products and services to its TPN-customers  
under its "Nutrishare" mark. (Okamoto Decl. ¶ 14.) Second,  
because both enteral and TPN products and services relate to  
digestive/ gastrointestinal complications, the two methods share a  
close proximity to one another and could reasonably implicate  
customer confusion. See Entrepreneur Media v. Smith, 279 F.3d  
1135, 1147 (9th Cir. 2002) ("Related goods are those products

1 plaintiff demonstrated "something more" in order to base  
2 jurisdiction in California when, in addition to its generic  
3 national marketing campaign that was alleged to have infringed  
4 plaintiff's trademark, "Defendant has also made two California  
5 sales since the challenged advertisements began running.").  
6 Moreover, plaintiff has submitted a declaration from a Southern  
7 Californian resident who contacted defendant via the toll-free  
8 number listed on its website. (Bundy Decl. ¶ 3.) After simply  
9 inquiring whether defendant offered its services in California,  
10 defendant's head TPN pharmacist purportedly offered to send one  
11 of defendant's nurses to California to assist the declarant with  
12 her TPN setup.<sup>5</sup> (Id.) Subsequently, the declarant asserts that  
13 defendant sent her a "start-up" packet, including a binder  
14 containing "NutriThrive" promotional materials and a business  
15 \_\_\_\_\_  
16 which would be reasonably thought by the buying public to come  
17 from the same source if sold under the same mark.").

17 <sup>5</sup> Defendant has objected to admission of Ms. Bundy's  
18 conversation with defendant's head TPN pharmacist on grounds of  
19 hearsay, lack of foundation, and lack of personal knowledge.  
20 (Def.'s Objections to Evid. # 11.) Ms. Bundy's declaration,  
21 however, sufficiently establishes personal knowledge and  
22 foundation where it provides that Ms. Bundy placed the phone  
23 calls herself, the date she placed the calls, and the number she  
24 dialed. Fed. R. Evid. 104, 602. Additionally, statements from  
25 defendant's head TPN pharmacist are not hearsay because  
26 communications made by defendant's employees constitute party  
27 admissions. Id. 801(d)(2).

28 Overall, defendant raised fifteen evidentiary  
objections to plaintiff's opposition and supporting materials,  
made primarily on the grounds that the statements and/or  
materials at issue constitute inadmissible personal opinions or  
hearsay, lack personal knowledge, and/or are irrelevant. The  
court finds that the majority of these objections, made as usual  
after the other side has no realistic opportunity before the  
hearing to cure the alleged defects, are spurious and thereby  
immaterial to the court's analysis of the motions. To the extent  
that any objected-to-evidence is relevant and relied on by the  
court herein, the court overrules any asserted objections to that  
evidence.

1 card. (Id.); see W. Corp. v. Superior Court, 116 Cal. App. 4th  
2 1167, 1176 (2004) (finding that marketer who "upsells" by  
3 offering additional products or services to customer who  
4 initially contacts marketer, knowing that customer is California  
5 resident, avails itself of California for business even though  
6 customer placed initial call).

7           Consequently, because plaintiff sufficiently alleges  
8 that defendant's operation of an interactive website--  
9 supplemented by its direct marketing toward California and  
10 ongoing relationships with California-based consumers--has caused  
11 plaintiff harm in the state of its "principal place of business,"  
12 Excel Plas, Inc. v. Sigmax Co., Ltd., No. 07-0578, 2007 WL  
13 2853932, at \*6 (S.D. Cal. Sept. 27, 2007), defendant has  
14 purposefully availed/directed itself to jurisdiction in  
15 California. See Tech Heads, Inc. v. Desktop Serv. Ctr., 105 F.  
16 Supp. 2d 1142, 1151 (D. Or. 2000) (holding that defendant  
17 "intentionally availed itself of jurisdiction" by "posting a  
18 highly commercial, highly interactive Web site on the World Wide  
19 Web, engaging in Internet commerce with at least one [forum  
20 state] resident, advertising in a national newspaper"); Stomp,  
21 Inc. v. Neato L.L.C., 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999)  
22 (finding that, by advertising its products for over the Internet,  
23 the defendant purposefully availed itself of the forum state,  
24 even though only two sales had been consummated with forum  
25 residents).

26           b. Claims Arising Out of/Related to Defendant's  
27 Forum-Related Activities

28           The second requirement for specific jurisdiction is

1 that the claims asserted in the litigation arise out of a  
2 defendant's forum related activities. Panavision Int'l, L.P. v.  
3 Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998). To determine  
4 whether a plaintiff's claims arise out of forum-related  
5 activities, courts apply a "but for" test--i.e., but for the  
6 defendant's forum-related activities through which it  
7 purposefully avails itself of the forum, the plaintiff would not  
8 have suffered injury. Doe v. Unocal Corp., 248 F.3d 915, 925  
9 (9th Cir. 2001).

10 Here, because the purported injuries that led plaintiff  
11 to assert its trademark and unfair competition claims against  
12 defendant arise directly from defendant's allegedly infringing  
13 conduct in California, plaintiff has similarly satisfied the  
14 second requirement for specific jurisdiction. See Rio Props. v.  
15 Rio Int'l Interlink, 284 F.3d 1007, 1021 (9th Cir. 2002) ("[T]his  
16 requirement was satisfied where [defendant's misappropriation] of  
17 [plaintiff's] trademark had the effect of injuring [plaintiff] in  
18 California, its home state."); Dole Food Co. v. Watts, 303 F.3d  
19 1104, 1114 (9th Cir. 2002) ("It is obvious that [plaintiff's]  
20 claims against [defendants] arise directly out of their contacts  
21 with the forum [where] the contacts between [defendants] and the  
22 forum state are integral and essential parts of the alleged  
23 fraudulent scheme on which [plaintiff] bases its suit.");  
24 WebZero, L.L.C. v. ClicVU, Inc., No. 08-0504, 2008 WL 1734702, at  
25 \*7 (C.D. Cal. Apr. 4, 2008) ("[I]t is plainly evident that  
26 [plaintiff's] patent infringement suit directly relates to  
27 ClivVU's allegedly infringing services . . . in California.").

28 c. Reasonableness of Exercising Jurisdiction

1 Because plaintiff has succeeded in satisfying both of  
2 the first two prongs in the specific jurisdiction analysis,  
3 defendant now has the burden of convincing the court that  
4 jurisdiction is nonetheless unreasonable. See Ballard v. Savage,  
5 65 F.3d 1495, 1500 (9th Cir. 1995) ("To avoid jurisdiction, [the  
6 defendant] must 'present a compelling case that the presence of  
7 some other considerations would render jurisdiction  
8 unreasonable.'" (quoting Burger King Corp. v. Rudzewicz, 471 U.S.  
9 462, 477 (1985))). The Ninth Circuit has articulated the  
10 following seven factors to determine whether the exercise of  
11 jurisdiction over a non-resident defendant comports with fair  
12 play and substantial justice, none of which is dispositive:

13 (1) the extent of the [defendant's] purposeful  
14 interjection into the forum state's affairs; (2) the  
15 burden on the defendant of defending in the forum; (3)  
16 the extent of conflict with the sovereignty of the  
17 [defendant's] state; (4) the forum state's interest in  
18 adjudicating the dispute; (5) the most efficient judicial  
19 resolution of the controversy; (6) the importance of the  
20 forum to the plaintiff's interest in convenient and  
21 effective relief; and (7) the existence of an alternative  
22 forum.

23 Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th  
24 Cir. 1993).

25 i. Defendant's Purposeful Interjection

26 A district court must usually begin by considering the  
27 extent to which the defendant, by its alleged activities,  
28 purposefully interjected itself into the forum. Id. at 1488. As  
defendant acknowledges, however, because the Ninth Circuit has  
found that "[t]he factor of purposeful interjection is analogous  
to the purposeful direction analysis" discussed above, this  
factor does not weigh against jurisdiction where the court has

1 already determined that defendant purposefully directed its  
 2 activities at the forum state. Sinatra v. Nat'l Enquirer, Inc.,  
 3 854 F.2d 1191, 1199 (9th Cir. 1988); see also Roth v. Garcia  
 4 Marquez, 942 F.2d 617, 623 (9th Cir. 1991) (finding that "[i]n  
 5 light of the first prong of purposeful availment, analysis of  
 6 this first factor in the third prong would be redundant" and thus  
 7 "there is no need to analyze this first factor separately");  
 8 Corp. Inv. Bus. Brokers v. Melcher, 824 F.2d 786, 790 (9th Cir.  
 9 1987) ("Ninth Circuit cases give the 'purposeful interjectment'  
 10 factor no weight once it is shown that the defendant purposefully  
 11 directed its activities to the forum state . . . .").

12 ii. Defendant's Burden of Litigating in  
 13 California

14 The court must also consider the burden that litigating  
 15 in the forum state places on the nonresident defendant. Callaway  
 16 Golf Corp. v. Royal Canadian Golf Ass'n, 125 F. Supp. 2d 1194,  
 17 1205 (C.D. Cal. 2000). While acknowledging that defendant, whose  
 18 principal place of business is in Ohio, would be inconvenienced  
 19 by having to defend itself in California, "with the advances in  
 20 transportation and telecommunications and the increasing  
 21 interstate practice of law, any burden is substantially less than  
 22 in days past."<sup>6</sup> Menken v. Emm, 503 F.3d 1050, 1060 (9th Cir.  
 23 2007); see also Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d  
 24 126, 128-29 (9th Cir. 1995) (noting that unless the

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25  
 26 <sup>6</sup> In fact, the court takes judicial notice of the fact  
 27 that defendant's counsel is headquartered in San Diego,  
 28 California. See Fed. R. Evid. 201 (allowing courts to take  
 judicial notice of matters that are "capable of accurate and  
 ready determination by resort to sources whose accuracy cannot  
 reasonably be questioned").



1 "inconvenience is so great as to constitute a deprivation of due  
2 process, it will not overcome clear justifications for the  
3 exercise of jurisdiction.") (citation omitted). Thus, any weight  
4 gleaned from this factor in defendant's favor is negligible.

5                   iii. Sovereignty Interests

6               Both parties agree that, to the extent the court must  
7 consider whether the exercise of jurisdiction in California would  
8 conflict with the sovereignty interests of defendant's  
9 alternative forum of Ohio, Panavision Int'l, L.P. v. Toeppen, 141  
10 F.3d 1316, 1323 (9th Cir. 1998), this factor is inapplicable  
11 "because there is no conflict between the sovereignty of Ohio  
12 and California." (Pl.'s Opp'n to Def.'s Mot. to Dismiss  
13 23:12-13; Def.'s Reply in Supp. of Mot. to Dismiss 15:3-5.)

14                   iv. State's Interest

15               Because "California maintains a strong interest in  
16 providing an effective means of redress for its residents [who  
17 are] tortiously injured," Core-Vent Corp. v. Nobel Indus. AB, 11  
18 F.3d 1482, 1489 (9th Cir. 1993) (internal citations omitted),  
19 this factor weighs in plaintiff's favor. See Dole Food Co. v.  
20 Watts, 303 F.3d 1104, 1116 (9th Cir. 2002) ("Since [plaintiff's]  
21 principal place of business is California, this factor favors  
22 plaintiff."); accord Panavision Int'l, L.P., 141 F.3d at 1323.

23                   v. Efficiency of the Forum

24               The "efficiency of the forum" factor focuses on "where  
25 the witnesses and the evidence are likely to be located."  
26 Core-Vent Corp., 11 F.3d at 1489. The court recognizes that  
27 witnesses will presumably come from both California and Ohio, but  
28 the majority of witnesses, as well as evidence related to

1 defendant's infringing conduct, appear to be located in  
2 California. Thus, this factor also weighs in favor of plaintiff.

3 vi. Convenience and Effectiveness of Relief  
4 for Plaintiff

5 "Although the importance of the forum to the plaintiff  
6 nominally remains part of this test, cases have cast doubt on its  
7 significance." Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d  
8 126, 129 (9th Cir. 1995) (citing Core-Vent Corp., 11 F.3d at  
9 1490). As the Ninth Circuit has previously stated, "[n]o  
10 doctorate in astrophysics is required to deduce that trying a  
11 case where one lives is almost always a plaintiff's preference."  
12 Roth v. Garcia Marquez, 942 F.2d 617, 624 (9th Cir. 1991); see  
13 also Dole Food Co., Inc., 303 F.3d at 1116 ("[I]n this circuit,  
14 the plaintiff's convenience is not of paramount importance.").  
15 Consequently, this factor does not significantly influence the  
16 court's analysis.

17 vii. Availability of an Alternative Forum

18 Plaintiff fails to demonstrate that an alternative  
19 forum, presumably Ohio, is either unavailable or unable to  
20 effectively adjudicate the instant dispute. Defendant has not,  
21 however, identified a "regulatory or policy interest[ that would  
22 be] served by the exercise of jurisdiction in [the alternative  
23 forum], making it unlikely that [the alternative forum] possesses  
24 a strong interest in providing a forum to resolve this suit."  
25 Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1201 (9th Cir.  
26 1988). Moreover, "whether another reasonable forum exists  
27 becomes an issue only when the forum state is shown to be  
28 unreasonable." Id. (citation omitted).

1 In balancing the reasonableness factors, the court  
2 concludes that defendant has failed to present a compelling case  
3 that the exercise of jurisdiction in California would be  
4 unreasonable. See Caruth, 59 F.3d at 128 ("Since [defendant]  
5 purposefully availed itself of the forum state, we begin with a  
6 presumption of reasonableness which can only be overcome by a  
7 'compelling case that the presence of some other considerations  
8 would render jurisdiction unreasonable.'" ) (citation omitted).  
9 Accordingly, because plaintiff's claims arise from defendant's  
10 purposefully directed, forum-related conduct, the court will deny  
11 defendant's motion to dismiss for lack of personal jurisdiction.

12 B. Motion to Dismiss for Improper Venue or, Alternatively,  
13 Motion to Transfer Venue

14 Defendant next argues that, even if susceptible to  
15 personal jurisdiction in California, plaintiff's assertion of  
16 venue in this district is nonetheless improper and the court  
17 should dismiss the action or, alternatively, transfer it to the  
18 Southern District of California pursuant to 28 U.S.C. § 1406(a).  
19 Under § 1406(a), if an action is filed in the wrong district, the  
20 court must, upon timely motion, dismiss the action or, if it be  
21 in the interest of justice, order transfer to any district where  
22 the "action could have been brought." 28 U.S.C. § 1406(a); see  
23 also Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d  
24 1174, 1181 (9th Cir. 2004) ("A defendant over whom personal  
25 jurisdiction exists but for whom venue is improper may move for  
26 dismissal or transfer for improper venue under 28 U.S.C. §  
27 1406(a)."). When venue is challenged under § 1406(a), the  
28 plaintiff bears the burden of establishing that venue is in the

1 proper forum. See Airola v. King, 505 F. Supp. 30, 31 (D. Az.  
2 1980); see also Hope v. Otis Elevator Co., 389 F. Supp. 2d 1235,  
3 1243 (E.D. Cal. 2005) ("Plaintiff has the burden of proving that  
4 venue is proper in the district in which the suit was  
5 initiated.").

6 Venue in federal Lanham Act cases is governed by the  
7 general venue statute, 28 U.S.C. § 1391(b), which states that  
8 venue is proper in a judicial district (1) in which any defendant  
9 resides, if all defendants reside in the same state; (2) in which  
10 a substantial part of the events or omissions giving rise to the  
11 claim occurred; or (3) in which any defendant may be found, if  
12 there is no other district in which the action may be brought.  
13 Id. § 1391(b)(1)-(3). "[A] defendant that is a corporation shall  
14 be deemed to reside in any judicial district in which it is  
15 subject to personal jurisdiction at the time the action is  
16 commenced." Id. § 1391(c). However, "this does not mean that  
17 venue is proper in any district where defendant could be  
18 subjected to service." Johnson Creative Arts v. Wool Masters,  
19 743 F.2d 947, 950 (1st Cir. 1984). Rather, in states like  
20 California that have more than one judicial district, "such  
21 corporation shall be deemed to reside in any district in that  
22 State within which its contacts would be sufficient to subject it  
23 to personal jurisdiction if that district were a separate State."  
24 28 U.S.C. § 1391(c). "This effectively turns the venue question  
25 into a personal jurisdiction analysis, treating the Eastern  
26 District of California as a state." Honor Plastic Indus. v.  
27 Lollicup USA, Inc., No. 06-0707, 2006 WL 2792812, at \*5 (E.D.  
28 Cal. Sept. 26, 2006).

1           Given § 1391(c)'s express instruction, plaintiff must  
2 satisfy its burden by demonstrating the existence of substantial  
3 contacts or purposeful avialment/direction by which defendant has  
4 subjected itself to personal jurisdiction in the Eastern District  
5 of California.<sup>7</sup> Plaintiff's "demonstration" of such contacts  
6 and/or conduct is limited to its conclusory assertions that  
7 personal jurisdiction exists in this district because (1)  
8 defendant has registered with the California State Board of  
9 Pharmacy in Sacramento and appointed an agent for service of  
10 process, and (2) a woman named "Jessi" from Redding, California  
11 purportedly posted an online message indicating that she had  
12 engaged in discussions with defendant about possible treatment.

13           First, as thoroughly addressed above, see supra,  
14 Section II.A.1, substantial due process concerns prevent the  
15 exercise of personal jurisdiction over defendant based solely on  
16 compliance with a state statute such as the one at issue here--  
17 particularly when registration and agent designation took place  
18 in Sacramento purely because Sacramento, as the State capital, is

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19  
20           <sup>7</sup> In the event the court remained unconvinced as to the  
21 propriety of either personal jurisdiction or venue after its  
22 consideration of plaintiff's evidence and arguments, plaintiff  
23 had initially requested a continuance for additional discovery  
24 related solely to jurisdiction and/or venue. (Pl.'s Mem. in  
25 Opp'n to Def.'s Mot. to Dismiss 27:10-12); see also Bulldog W.  
26 Equip. v. Mapcon, Inc., No. 06-2183, 2007 WL 973970, at \*8 (D.  
27 Ariz. Mar. 30, 2007) ("[U]pon a request to permit discovery or an  
28 evidentiary hearing on a matter of personal jurisdiction, 'the  
trial court is vested with broad discretion [to deny such  
request] and will not be reversed except upon the clearest of  
showing that denial of discovery results in actual and  
substantial prejudice to the complaining litigant.'" (quoting  
Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430  
n.24 (9th Cir. 1977))). During subsequent oral argument on the  
instant motions, however, plaintiff's counsel explicitly withdrew  
this request and instead elected to have the court decide the  
matter based on the already-submitted materials.

1 home to the California State Board of Pharmacy. See, e.g.,  
2 Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971)  
3 ("The principles of due process require a firmer foundation than  
4 mere compliance with state domestication statutes.").

5 Second, plaintiff has failed to present the court with  
6 a declaration from, or any actual relevant evidence ascertaining  
7 the identity or whereabouts of, "Jessi." Instead, plaintiff  
8 offers nothing more than a printout of an online bulletin board  
9 from a third-party website (www.parent-2-parent.com) on which  
10 several thousand users have posted messages, one of which is  
11 submitted under the username "Jessi" and indicates that this user  
12 has been in contact with defendant.<sup>8</sup> (Okamoto Decl. Ex. D); cf.  
13 Earth Prods., Inc. v. Meynard Designs, Inc., No. 05-1326, 2006 WL  
14 2192124, at \*2 (W.D. Wash. July 31, 2006) (finding that venue in  
15 the district was improper where the defendant's letter to a  
16 retailer in the district "constitutes the only evidence regarding  
17 [defendant's] use of the allegedly infringing trademark in [the  
18 district]"). Defendant categorically denies plaintiff's  
19 assertions that it has initiated contact and/or entered into  
20 commercial relationships with any prospective customers in this  
21 district, including "Jessi." (Rielly Decl. ¶ 13; Pfister Decl. ¶  
22 8.) Defendant further reasserts under the penalty of perjury  
23 that it only has had three California-based customers in its

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24  
25 <sup>8</sup> Even if the court was inclined to bestow any weight to  
26 "Jessi's" purported bulletin board posting, such evidence must be  
27 rejected on hearsay grounds because plaintiff is offering the  
28 online statement for the truth of the matter asserted--i.e., that  
"Jessi" had been in contact with defendant. See Fed. R. of Evid.  
801(c) ("Hearsay" is a statement, other than one made by the  
declarant while testifying at the trial or hearing, offered in  
evidence to prove the truth of the matter asserted.").

1 existence, all of whom are based in Southern California and only  
2 two of which use "NutriThrive" products. (Rielly Decl. ¶ 13);  
3 see also Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797,  
4 800 (9th Cir. 2004) (finding that "plaintiff cannot 'simply rest  
5 on [] bare allegations'" (citation omitted); Jaliwa v. Concerned  
6 Citizens of S. Cent. L.A., No. 06-2617, 2007 WL 2021818, at \*4  
7 (S.D. Cal. July 10, 2007) ("[Plaintiff's] bare assertion of  
8 belief that [defendant] resides in this district is insufficient  
9 to satisfy Plaintiff's burden of establishing that [defendant]  
10 resides in this district.").

11         Consequently, because it is "essentially uncontroverted  
12 that defendant's business contacts with the [Eastern] District  
13 have been extremely limited" (general jurisdiction) and "there  
14 have been minimal, if any, 'events or omissions' by defendant in  
15 the [Eastern] District giving rise to plaintiff's claims"  
16 (specific jurisdiction), the Eastern District--as a hypothetical  
17 separate state--could not exercise personal jurisdiction over  
18 defendant and thus plaintiff has failed to demonstrate that venue  
19 is proper in this district. Jamba Juice Co. v. Jamba Group, No.  
20 01-4846, 2002 WL 1034040, at \*2-3 (N.D. Cal. May 15, 2002); see  
21 also Kelly v. Qualitest Pharms., Inc., No. 06-0116, 2006 WL  
22 2536627, at \*11 (E.D. Cal. Aug. 31, 2006) (finding that, because  
23 "[t]he burden was on Plaintiff to show that venue was proper" and  
24 "the allegations indicate [only] attenuated conduct by  
25 Defendant," "Plaintiff has failed to meet her burden of showing  
26 that venue is proper in the Eastern District of California");  
27 Injen Tech. Co. Ltd. v. Advanced Engine Mgmt., 270 F. Supp. 2d  
28 1189, 1196 (S.D. Cal. 2003) (holding that because defendant did

1 not sell infringing products in the Southern District of  
2 California, "the Court concludes that if the Southern District of  
3 California were a separate forum state, the defendant's contacts  
4 with the district would be insufficient to justify the Court's  
5 exercise of specific jurisdiction"); Jamba Juice Co., 2002 WL  
6 1034040, at \*3 (finding that plaintiff failed to demonstrate  
7 proper venue in the Northern District of California where the  
8 only evidence submitted to supplement plaintiff's bare  
9 allegations showed that "defendant had no clients in northern  
10 California in its client database[, d]efendant does not advertise  
11 in the yellow pages in the Northern District[, d]efendant does no  
12 direct advertising in northern California, nor does defendant  
13 send any advertising mailers, brochures or letters into northern  
14 California. . . . Defendant, in short, does not direct any  
15 business activities at the Northern District, nor profit from any  
16 business activities in this district").

17           Because plaintiff has failed to meet its burden, the  
18 court, in the interests of justice, will exercise its discretion  
19 to transfer the action under 28 U.S.C. § 1406(a) to a venue that  
20 is appropriate. See Shell v. Shell Oil Co., 165 F. Supp. 2d  
21 1096, 1103 (C.D. Cal. 2001) (noting that, under § 1406(a), "[i]f  
22 a plaintiff commences an action in a district in which venue is  
23 not proper," "[t]he court has some discretion in choosing between  
24 [dismissing or transferring], though generally it is preferred to  
25 transfer the case rather than dismissing it altogether"). "If  
26 the Court's decision is to transfer, rather than dismiss, the  
27 transfer shall be made pursuant to a proper determination of  
28 venue pursuant to 28 U.S.C. § 1391[(b)]." Da Cruz v. Princess



1 Cruise Lines, Inc., No. 00-0867, 2000 WL 1585695, at \*2 (N.D.  
2 Cal. Oct. 12, 2000).

3 Defendant has requested transfer under § 1406(a) to the  
4 Southern District of California, and the court agrees that this  
5 venue is proper under § 1391(b) because a "substantial part of  
6 the events or omissions giving rise to the claim occurred" in San  
7 Diego particularly and Southern California generally. 28 U.S.C.  
8 § 1391(b)(2). Specifically, the "passing off" of defendant's  
9 allegedly infringing trademark would have occurred in the context  
10 of defendant's sales of its "NutriThrive" products and/or  
11 services to its California customers, all of whom are located in  
12 Southern California. See Vanity Fair Mills v. T. Eaton Co., 234  
13 F.2d 633, 639 (2d Cir. 1956) ("[I]n cases of trade-mark  
14 infringement and unfair competition, the wrong takes place . . .  
15 where the passing off occurs, i.e., where the deceived customer  
16 buys the defendant's product in the belief that he is buying the  
17 plaintiff's [product]."); see also Woodke v. Dahm, 70 F.3d 983,  
18 985 (8th Cir. 1995) ("The place where the alleged passing off  
19 occurred . . . provides an obviously correct venue.").

20 Additionally, defendant's advertisement announcing its  
21 upcoming presence at San Diego's Oley Conference--prominently  
22 featured on defendant's website as an opportunity for local  
23 attendees to meet and associate with "NutriThrive"  
24 representatives--also implicates the very events and  
25 circumstances giving rise to plaintiff's instant claims. Chiu v.  
26 Mann, No. 02-4590, 2003 WL 716247, at \*3 (N.D. Cal. Feb. 24,  
27 2003) ("Venue is also improper in the Northern District of  
28 California, because the events giving rise to plaintiff's claims

1 occurred . . . within the Central District of California." ).  
2 Finally, although plaintiff has submitted a declaration from  
3 Kathryn Bundy stating that defendant's solicited her and therein  
4 sent her a catalog of its services, it is nonetheless undisputed  
5 that Ms. Bundy also resides in Southern California. (Bundy Decl.  
6 ¶ 1.)

7           Accordingly, because the interests of justice favor the  
8 intrastate transfer of this action to a proper venue pursuant to  
9 § 1406(a) as opposed to plenary dismissal, the court will deny  
10 defendant's motion to dismiss but grant defendant's motion to  
11 transfer to the Southern District of California. See, e.g.,  
12 Jaliwa v. Concerned Citizens of S. Cent. L.A., No. 06-2617, 2007  
13 WL 2021818, at \*4 (S.D. Cal. July 10, 2007) (transferring case  
14 from the Southern District of California pursuant to § 1406(a)  
15 based on plaintiff's failure to establish proper venue and  
16 because "[t]his action could have been, and should have been,  
17 brought in the Central District of California . . . where the  
18 events that are the subject of this Complaint took place"); Injen  
19 Tech. Co. Ltd. v. Advanced Engine Mgmt., 270 F. Supp. 2d 1189,  
20 1195 (S.D. Cal. 2003) (transferring infringement case where  
21 "Defendant [] does not 'reside' in the Southern District of  
22 California for purposes of 28 U.S.C. § 1391(c) and, therefore,  
23 venue in this district is improper[; v]enue, however, clearly is  
24 proper in the Central District of California"); Jamba Juice Co.  
25 v. Jamba Group, No. 01-4846, 2002 WL 1034040, at \*3 (N.D. Cal.  
26 May 15, 2002) (transferring action from the Northern District of  
27 California pursuant to § 1406(a) after a finding of improper  
28 venue because "[v]enue is undoubtedly proper in the Central

1 District of California"); Da Cruz v. Princess Cruise Lines, Inc.,  
2 No. 00-0867, 2000 WL 1585695, at \*5 (N.D. Cal. Oct. 12, 2000)  
3 (exercising discretion under § 1406(a) to transfer the case from  
4 Northern District of California, where venue was deemed improper,  
5 because "it appears to this Court that venue properly lies in the  
6 Central District of California, since defendant could be said to  
7 'reside' there in accordance with the test for general personal  
8 jurisdiction described above").

9 IT IS THEREFORE ORDERED that:

10 (1) defendant's motion to dismiss plaintiff's Complaint  
11 for lack of personal jurisdiction be, and the same hereby is,  
12 DENIED; and

13 (2) defendant's motion to transfer based on improper  
14 venue be, and the same hereby is, GRANTED.

15 Pursuant to the provisions of 28 U.S.C. § 1406(a), this  
16 case is hereby ordered TRANSFERRED to the United States District  
17 Court for the Southern District of California for all further  
18 proceedings.

19 DATED: August 14, 2008

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22 WILLIAM B. SHUBB  
23 UNITED STATES DISTRICT JUDGE  
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